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## Make Pennsylvania Free Again

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# Make Pennsylvania Free Again

By: Margaret Riley, *Arcadia Univerity*

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## FORWARD

The author created this paper for a class assignment testing students' knowledge of constitutional law. The assignment was to write a legal brief addressing the constitutionality of a statewide mask mandate during the COVID-19 pandemic. COVID-19 is an airborne disease that can be transmitted from person to person up to six feet apart. The hypothetical facts provided for this brief were that a suit was filed in Pennsylvania state court by a group of individuals in opposition to the state's mask mandate that was enacted to address the COVID-19 pandemic. The goal of this brief is to demonstrate knowledge of how courts address constitutional issues, how fundamental rights are established or violated, and how to write persuasively and concisely. The data in this brief was accurate as of May 2021. With those goals in mind, the following brief was the result.

## TABLE OF AUTHORITIES

*Henning Jacobson v. Commw. of Massachusetts*, 197 U.S. 11 (1905).  
*Obergefell v. Hodges*, 135 S. Ct. 2584, 915 (2015).  
*Crowley v. Christensen*, 137 U.S. 86, 89 (1890).  
*Korematsu v. United States*, 323 U.S. 214, 721 (1944).  
*Buck v. Bell*, 274 U.S. 200, 951 (1927).  
*Loving v. Virginia*, 388 U.S. 1, 909 (1967).  
*Stanley v. Illinois*, 405 U.S. 645, 930 (1972).  
*Moore v. City of East Cleveland*, 431 U.S. 494, 938 (1977).  
*Grutter v. Bollinger*, 539 U.S. 306, 807 (2003).  
*Redhail v. Zablocki*, 434 U.S. 378, 910 (1978).

## EXECUTIVE SUMMARY

The petitioners in this case argue that there exists a fundamental right to refuse to wear a mask during the ongoing COVID-19 pandemic. The Commonwealth of Pennsylvania, the respondent in this case, enacted a statewide mask mandate in July 2020 in order to reduce the spread of the virus. Petitioners'

asserted right in this case does not fall into what the Supreme Court of the United States has upheld as a fundamental right. Even if the Court does find that there is a fundamental right to refuse to wear a mask, the Commonwealth's mask mandate meets both the pandemic regulation standard established in *Jacobson v. Commonwealth of Massachusetts* and strict scrutiny. *Jacobson* established a test that provides regulations are constitutional if they are (1). Enacted to promote public health and (2). Have a real and substantial relation to those promotions. The Commonwealth's mask mandate's express purpose is to prevent the spread of the virus, and mask-wearing has been shown to achieve that goal by covering the sources of the respiratory droplets that carry the virus. As such, the *Jacobson* standard is satisfied and the mask mandate withstands this constitutional challenge. Additionally, the mask mandate satisfies the standard of strict scrutiny. This model of review is applied to infringements of fundamental rights and consists of two parts: (1). The regulation must be in pursuit of a compelling government interest and (2). The means selected to achieve that interest must be narrowly tailored. Pennsylvania's mask mandate is meant to protect public health and is directed at the precise way that the virus is spread. Masks and face coverings provide a barrier between the areas of the face that produce respiratory droplets and others who may be vulnerable to breathing in those droplets. The mandate's goal and means of achieving that goal satisfy both parts of strict scrutiny and can withstand even the most rigorous constitutional model for review, even if it is found that there is a fundamental right to refuse to wear a mask.

## ARGUMENT

### I. The choice to wear or not wear a mask is not a fundamental right.

The petitioners in this case contend there is a fundamental right to refuse to wear a mask in public during a pandemic, and as such, that right must be protected by the State. The Constitution does not recognize a right to refuse to comply with state-mandated

public health measures to protect oneself and others from a contagious disease. Simply put, petitioners' asserted right in this case to refuse to wear a mask does *not* rise to the level of importance of other fundamental rights recognized by the Supreme Court. The Supreme Court of the United States has provided that a fundamental right is one that is "central to individual dignity and autonomy... [that] requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." The process of identifying a fundamental right cannot be reduced to a formula and requires reasoned judgment by the Court, however "*history and tradition* guide and discipline this inquiry."<sup>1</sup> (emphasis added). While history and tradition do not set the outer limits of what can be defined as a fundamental right, petitioners' assertion is wholly unsupported by the Supreme Court: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community . . . . It is, then, liberty regulated by law."<sup>2</sup> Even when there is an infringement upon an individual's rights, those infringements may be justified under the circumstances which they were imposed. The people are sometimes asked to make small sacrifices or bear small burdens in order to protect some greater common interest such as national security or promotion of the general welfare because "citizenship has its responsibilities as well as its privileges and in time of war the burden is always heavier" and "we have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those . . . for these lesser sacrifices."<sup>3</sup> The notion of being asked to sacrifice some liberty for the promotion of a larger goal is the basis of the Court's reasoning in *Jacobson*, and it should be the basis of the decision in the instant case as well. The petitioners' assertion that there is a fundamental right to refuse to wear a mask during a pandemic is categorically untrue.

The case on point in regards to the power of

the state government during a pandemic is *Jacobson v. Commonwealth of Massachusetts*. The plaintiff, in that case, refused to comply with a statewide vaccination mandate during an outbreak of smallpox. *Jacobson* argued "that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the *inherent right* of every freeman to care for his own body and health in such [*sic*] way as to him seems best." At 361 (emphasis added). *Jacobson* contends that the government's action infringed upon his right to make decisions about his health on his own volition, free from interference from the government. However, the Court reasoned that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."<sup>4</sup> The Court held in this case that Mr. *Jacobson* did not possess the right to flout public health regulations during a disease outbreak, and as such, it must not be protected the way fundamental rights are to be. The Supreme Court of the United States has recognized many important aspects of American life as being so fundamental to civil society that they must be afforded the protection of the State. Among these aspects are marriage, child custody, and the notion of "keeping the family together." (See *Loving v. Virginia*, 388 U.S. 1, 909 (1967) recognizing a fundamental right to marriage; *Stanley v. Illinois*, 405 U.S. 645, 930 (1972) provided that the right to custody of one's children may not be infringed without due process of law; *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 938 (1977) determined that a city ordinance's definition of "family" was too narrow). None of these recognized rights involve a right to ignore state regulations regarding health and safety during a pandemic. The rights recognized in the above cases are *applicable* to many situations in which a state is regulating the people. The rights stated above are also premised on the fact that they are deeply rooted in the history and tradition of the United States. The right to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 915 (2015).

2. *Crowley v. Christensen* 137 U.S. 86, 89 (1890), quoted in *Jacobson v. Commonwealth of Massachusetts*, 25 S. Ct. 358, 359 (1905).

3. *Korematsu v. United States*, 323 U.S. 214, 721 (1944); *Buck v. Bell*, 274 U.S. 200, 951 (1927). While the rules of law from *Korematsu* and *Buck* are being used in this brief to support the notion of the State mandating a sacrifice from the people to protect "the greater good," it should be noted that the holdings of both of these cases (internment of Japanese-Americans and the sterilization of the mentally ill, respectively) are reprehensible.

4. *Jacobson*, 25 S. Ct. 358, 359.

of happiness by free men,” custody rights cannot be “suppl[ie]d nor hinder[ed]” by the state, and keeping the family together has been recognized as a “basic value that underlies our society.”<sup>5</sup> The right asserted by petitioners, that they do not have to wear a mask in public during a pandemic, is only applicable to the once-in-a-lifetime circumstances of the COVID-19 pandemic. If the right to refuse to wear a mask during a pandemic is recognized as a fundamental right by this Court, the next logical question is: where does it stop? Do surgeons have the right to refuse to wear a mask during surgery? Do people have a right to refuse to wear shoes in public? There is no basis for the right asserted by petitioners except for the fact that they are inconvenienced by the mandate. However, just because something is inconvenient does not mean that it deserves to be struck down by the Court.

## **II. Even if the court finds the infringement of a fundamental right, the Governor satisfies the *Jacobson v. Commonwealth of Massachusetts* pandemic standard.**

A statewide mask mandate is, without a doubt, supported by both science and the Constitution. *Jacobson v. Commonwealth of Massachusetts* developed a test that is applicable to regulations made by a state during a pandemic before the development of other models of review such as strict scrutiny. A state regulation is unsupported by the Constitution if it has not “been enacted to protect the public health, the public morals, or the public safety, [and/or] has no real or substantial relation to those objects or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”<sup>6</sup> Pennsylvania’s mask mandate meets this standard, and therefore should be upheld even if the right to refuse to wear a mask is determined to be a fundamental right. The pandemic

standard established in *Jacobson* is satisfied in the instant case because of the large amount of evidence showing that masks are effective means of mitigating the spread of the virus. COVID-19 is a virus that attacks the respiratory system, and as such it “spreads mainly from person to person through respiratory droplets . . . . These droplets can land in the mouths or noses of people who are near you or they may breathe these droplets in.” Masks have been shown to protect others and oneself from contracting the disease by placing a barrier between areas where respiratory droplets are released (the nose and mouth) and one’s surroundings.<sup>7</sup> Thirty-eight states currently enforce mask mandates for public places in order to slow the spread of the disease as cases rise to 78 million nationally, affecting over two million Pennsylvanians, with deaths at over 900 thousand nationally, 42 thousand of which are Pennsylvanians.<sup>8</sup> Public health experts largely support mask-wearing in order to mitigate community spread of the disease: “Masks are now recognized as one of the most effective available tools to mitigate the spread of COVID-19. This intervention decreases transmission of the coronavirus and is a readily scalable measure to ensure the public’s health.”<sup>9</sup> Statewide mask mandates have been put in place for the sole purpose of protecting the public health, a power which falls squarely within a State’s police power to protect the health, safety, and welfare of its citizens. The Supreme Court “has distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description;’ indeed, *all laws* that relate to matters completely within its territory . . . .” Pennsylvania’s mask mandate clearly falls within the definition of “health laws of every description” and relates only to matters within the territory of the Commonwealth. It is beyond question that the mask mandate was enacted in order to protect the public health and safety and has a real and sub-

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5. *Loving v. Virginia*, 388 U.S. 1, 909 (1967); *Stanley v. Illinois* 405 U.S. 645, 930 (1972); *Moore v. City of East Cleveland*, 431 U.S. 494, 938 (1977).

6. *Ibid.*

7. “*Considerations for Wearing Masks*,” *Coronavirus Disease 2019 (COVID-19)*, Center for Disease Control and Prevention (CDC), accessed December 7, 2020, <https://www.hill.af.mil/Portals/58/documents/Corona%20Virus/WearingMasks.pdf>.

8. Andy Markowitz, “State-by-State Guide to Face Mask Requirements,” AARP, last modified March 14, 2022, accessed December 17, 2020, <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html>; “United States Coronavirus Cases,” Worldometer, <https://www.worldometers.info/coronavirus/country/us/>; “Pennsylvania Coronavirus Cases,” Worldometer, <https://www.worldometers.info/coronavirus/usa/pennsylvania/>.

9. Rebekah E. Gee and Vin Gupta, “Mask Mandates: A Public Health Framework For Enforcement,” *Health Affairs Forefront* (blog), October 5, 2020, <https://www.healthaffairs.org/doi/10.1377/forefront.20201002.655610>.

stantial relation to that goal because of the amount of evidence providing that masks do, in fact, reduce the spread of COVID-19. It may be true that one possesses a right to care for one's own health as one chooses, but that right does *not* supercede the rights of others to be secure in their health and does *not* entail the ability to disregard state actions that fall squarely within the police power to regulate the health, safety, and welfare of citizens. The Supreme Court "has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.'"<sup>10</sup> As stated in the first section of this argument, it is a settled principle that the State may, in certain circumstances, ask the people to make a sacrifice or bear a burden in order to protect the citizenry as a whole. The COVID-19 pandemic is one of these circumstances and, as such, the State may ask the people to temporarily sacrifice the comfort and freedom to be in public without a mask in order to protect themselves and others from the virus. The mask mandate satisfies *Jacobson's* test because the law is substantially related to the protection of the public's health. As such, even if one does possess a fundamental right to refuse to wear a mask, the standard for regulations during a pandemic is met and therefore the mask mandate withstands constitutional challenge.

### **III. Even if the court finds the infringement of a fundamental right, the Governor satisfies strict scrutiny.**

Pennsylvania's mask mandate can withstand even the most "fatal" constitutional challenge. Strict scrutiny is the model for review used by the Court in circumstances of specific types of discrimination or infringement of a fundamental right. The model was first utilized in *Korematsu* when deciding whether or not restrictions on the movement of Japanese-Americans during World War II was constitutional.<sup>11</sup> The test consists of two parts: (1). Is the government's regulation

in pursuit of a compelling government interest? (2). Is the means selected to pursue that interest narrowly tailored to accomplishing it? Pennsylvania's mask mandate is both in pursuit of a compelling governmental interest and is narrowly tailored to achieve that goal.

It is a compelling interest of the government to protect its citizens from catching and spreading a deadly disease. According to the text of the order itself, the purpose of the mask mandate is to "protect the public from the spread of COVID-19," which, as described in the prior section of this brief, has claimed the lives of more than 300,000 Americans and 13,000 Pennsylvanians.<sup>12</sup> Protecting the public from a disease as contagious and deadly as this virus rises to the level of importance of other assertions by governments that have been upheld by the Court as a "compelling government interest." The Court has determined that matters such as protecting national security and promoting diversity in schools are compelling enough government interests to justify an infringement upon a fundamental right.<sup>13</sup> The proliferation of this virus through the country and the state of Pennsylvania, and the amount of harm that it has caused, amounts to a threat of national security. Respondents in this case are simply trying to protect the people of this Commonwealth from the enemy that is COVID-19. The police powers of the states already empower state governments to enact laws promoting the health, safety, and welfare of the people. The police powers of the state combined with the special circumstances of a virus killing more Americans than those killed in the Vietnam War make it especially compelling that the state be allowed to enact this mask mandate.<sup>14</sup> Protecting Pennsylvanians from spreading or contracting a deadly disease is a compelling interest of the government and satisfies the first part of the strict scrutiny test.

A statewide mask mandate is the most effective and the most narrowly tailored to the government interest stated above. As discussed in the above section, the virus is transmitted through respiratory droplets

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10. *Jacobson*, 25 S. Ct. 358, 359.

11. *Korematsu*, 323 U.S. 214, 721 (1944).

12. Rachel Levine, *Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings*, Pennsylvania Department of Health (Jul. 1, 2020).

13. *Ibid.*; *Grutter v. Bollinger*, 539 U.S. 306, 807 (2003).

14. "America's Wars," Office of Public Affairs, Department of Veterans Affairs, May 2021, [https://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf).

that are produced from the *nose and mouth*, both of which are covered by a mask or other face covering. The mask creates a barrier that prevents an infected person from spreading those droplets to others and a non-infected person from breathing in those droplets. A mask mandate for public spaces directly targets how the virus is spread from person to person and has been proven to reduce community transmission. It is more narrowly tailored than general social distancing measures, such as six-foot distancing markers in stores or hand sanitizer dispensers, *because* it is in direct relation to how the virus is transmitted. In order to meet strict scrutiny, it must be proven that the means selected to achieve the compelling government interest are the least restrictive possible. The Court has held that some means to compelling ends, such as ensuring that child support is paid or avoiding overcrowding in public schools, are not the least restrictive and therefore are unconstitutional.<sup>15</sup> (A Wisconsin law prohibited marriage under circumstances where a member of the couple was responsible for child support payments from a previous marriage.<sup>16</sup> A city housing ordinance limited the definition of “family” to only the nuclear family.) In the instant case, a mask mandate is without a doubt the least restrictive means to achieving the compelling interest of protecting the public’s health, and it is narrowly tailored to achieving this end. Other, less restrictive means of preventing the spread of the virus do not adequately achieve the end asserted by the respondents. Encouraging people to stay home, remain at a six-foot distance from others, and discouraging socialization do not mitigate the spread as effectively as mandated mask-wearing because they do not directly target the source of the virus. For example, Florida is one of the twelve states that does not have a mask mandate and has implemented almost no restrictions whatsoever as the state government allows “bars, restaurants, theaters and theme parks to operate at full capacity. [And the governor] has vowed the state would never again implement lockdowns.”<sup>17</sup> While this has allowed Florida’s economy to continue to heal, there are currently 1.2 million cases in the state and 20 thousand deaths.<sup>18</sup> Simply telling people

that the virus is dangerous is not enough to actually <https://www.arcgis.com/apps/dashboards/2c9ba0a8d-6374555bc4bc620be916bae>. achieve the goal of protecting citizens from it, and this is clear from Florida’s laissez-faire approach. On the other hand, mask-wearing has been proven to reduce the spread of the virus, as explained in the previous section of this argument, and actually allows citizens to safely grocery shop or work in an office space. It is less restrictive than a complete lockdown as what was seen in the early months of the pandemic, but more effective than an approach such as Florida’s. Taking into account how dangerous this virus is and how other, less-restrictive approaches simply do not work, a mask mandate is the least restrictive means of achieving the goal of protecting public health. Pennsylvania’s mask mandate is the least restrictive, most effective, and most narrowly tailored measure in order to prevent the spread of COVID-19.

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15. *Redhail v. Zablocki*, 434 U.S. 378, 910 (1978).

16. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 938 (1977).

17. Arian Campo-Flores, “As COVID-19 Surges, Florida Sticks to No Statewide Restrictions,” *Wall Street Journal*, November 17, 2020, <https://www.wsj.com/articles/as-covid-19-surges-florida-sticks-to-no-statewide-restrictions-11605625421>.

18. “Florida COVID-19 Data Surveillance Dashboard,” USF Libraries, Florida Department of Health, accessed December 18th, 2020.

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